WONG SIE SING CONTRACTOR SDN BHD

v.

GREGORY ANAK ANYAU

COURT OF APPEAL, BRUNEI DARUSSALAM
FUAD PCA
HUGGINS JCA
MCMULLIN JCA
[CIVIL APPEAL NO: 3 OF 1997]
25 NOVEMBER 1997

CIVIL PROCEDURE: *Damages - Appellate court - Interference - When may appellate court interfere with trial court's award on damages - Wrong principle of law - Misapprehension of facts - Erroneous estimate of damage*

DAMAGES: *Serious injuries - Paraplegia - Loss of earnings - Loss of future earnings - Calculation - Multiplier - Multiplicand - Medical expenses - Cost of living allowance - Cost of helper - Services provided by friend or relative, whether recoverable*

TORT: *Negligence - Contributory negligence - Accident at work - Whether injured workman guilty of contributory negligence - Whether workman demurred to risk imposed by employer - Dangerous work - Duty of employer to protect employees at work - Adequacy of safeguards - Risk of dismissal*

The appellant appealed against the quantum of damages awarded to the respondent for personal injuries sustained as a result of an accident at work. The respondent cross-appealed against: (i) the finding that he had been contributorily negligent; and (ii) the method adopted by the court in arriving at the damages it awarded.

The appellant argued that the award for pain and suffering was excessive, for although the respondent became a paraplegia, he could move the upper part of his body. It was further argued that the respondent should not have been awarded the cost of a helper, there being no evidence that such an expense had been incurred. There was also the award on the cost of the medical items, the quantity of which in the appellant's opinion was too high.

The respondent submitted that an appellate court should not interfere with an award of general damages made by a judge. In addition there was evidence to show that a helper was needed to help the respondent in and out of bed. Besides, as the respondent was unable to control the lower part of his body, the medical items required by him might exceed the amount granted by the court.

Held:
Per Fuad PCA

[1] It is not the function of an appellate court to substitute its opinion for that of a trial judge. The court, before it interferes with an award of damages, should be satisfied that the judge has acted on a wrong principle of law, or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency.

[1a] In the instant appeal, the judge had not been shown to have acted upon an erroneous principle of law, nor to have misapprehended the facts. Comparable cases had been considered, and hence it was impossible to interfere with the award under the head of pain, suffering and loss of amenities.

[2] It is clear that if a plaintiff needs looking after and expenses are not incurred because the services are performed gratituously by a relative or friend, the costs can still be recovered as compensation to the extent that they are reasonable.

[2a] The judge had arrived at a fair value for the services provided by the respondent's family and occasionally by a paid helper which were made necessary by the respondent's injuries.

[3] If employers employ men on dangerous work for their own profit, they must take proper steps to protect them, even if these are expensive. If they cannot afford to provide adequate safeguards then they should not ask them to do it at all. The court ought not to be too astute to find a workman guilty of negligence either as the sole or a contributory cause of the accident, when he does not demur to a risk which the employer has imposed upon him, either by a breach of a common law duty or a breach of a statutory duty. An employee is under a duty to his employer to take reasonable precautions for his own safety; but when the failure to do so consists of not demurring to a risk which his employer has imposed on him, the court ought not to be astute in finding contributory negligence.

[3a] It was clear from the evidence that the respondent was working on the roof in the manner expected by the appellant when he slipped and fell. The respondent was simply doing his job in the manner required of him and the accident would not have happened had the appellant been concerned with the safety of its workers and provided them with safety

belts. It therefore could not be said that it was so unreasonable for the respondent to have continued working on the roof that day as to constitute contributory negligence. The instant court was unable to uphold the judge's conclusions on contributory negligence.

[4] The method of assessing the amount to award a surviving plaintiff for loss of earnings as the result of an accident is to calculate the actual loss from the date of the accident to the date of the trial and to award that sum as special damages. As regards future loss of earnings, an estimate is made of the likely average annual loss and for what period the loss will continue. The calculation is made from the date of the trial. A multiplier will then be applied to arrive at the appropriate capital sum to be awarded.

[4a] In the present case, 15 would be the appropriate multiplier for post-trial loss. In respect of the medical items, a multiplier of 16 would be right to ascertain the sum to award for the continuing medical expenses post-trial. There would be no reduction for contributory negligence and the following adjustments would have to be made to the award given at the trial: (i) pretrial loss of earnings would be reduced from B$33,320 to B$29,120 since cost of living allowance was not proved; (ii) the multiplicand for post-trial loss of earnings would be reduced from B$1,487 to B$1,337 for the same reason and applying a multiplier of 15 the figure of B$240,660 was reached; (iii) the cost of a helper would be increased from RM84,600 to RM86,400; and (iv) the total cost of the medical items would amount to RM127,392.

Per Huggins JCA

[1] The evidence did not support a finding that the respondent was entitled to a cost of living allowance. It was not mentioned in the written contract of service and none was paid. The sum should not be included in calculating the respondent's loss, both before and after trial.

[2] In relation to loss of earnings, there would be a pretrial loss of $1,040 for 28 months and a post-trial loss of $1,337 per month. The multiplier that should be applied would be 15.

[3] In relation to the future medical needs of the respondent, a multiplier of 16 would be fair.

[4] The risk of dismissal if a worker persists in asking for proper safety equipment is a material consideration and in the present case the trial court's finding of contributory negligence should be reversed.

[5] In relation to the medical equipment the award for both replacement and maintenance should not be interfered with. The total unadjusted damages of B$640,892 should be decreased to B$640,578 but the final total should be increased from B$468,852 to B$597,416. Interest to be awarded on the amended award.

[Appeal and cross-appeal allowed to the extent indicated with costs of the appeal and cross-appeal to the respondent.]

Cases referred to:
Agol Maritime Ltd v. Antonio Galleguillos Acori (PC Appeal No 46 of 1996) ***(refd)***
Chan Chi Fook v. Spennex Stainless Steel Industries [1995] BJ 208 ***(refd)***
Chan Choi Fook v. Spennex Stainless Steel Industries [1994] JCBD 273 ***(refd)***
Cheng Choy Choo v. Wong Teck & Anor 1992 MMD 341 ***(refd)***
Cunningham v. Harrison [1973] 942 ***(refd)***
Gelau Anak Paeng v. Lim Phek San [1965-1986] 2 BLR 152 ***(refd)***
General Cleaning Constractors Ltd v. Christmas [1953] AC 180 ***(foll)***
Graham v. Dodds [1983] 2 All ER 953 ***(refd)***
Harris v. Brights Asphalt Constractors Ltd [1953] 1 QB 617 ***(refd)***
Lai Wee Lian v. Singapore Bus Service [1978] 4 PCC 28 ***(refd)***
Machray v. Stewarts & Lloyds Ltd [1964] 3 All ER 716 ***(foll)***
Pickett v. British Rail Engineering Ltd [1979] 1 All ER 774 ***(foll)***
Yong Kuang Su v. Yong Siong Hai Transport Co (HCCS No 128 of 1995) ***(refd)***

For the appellant - Chan Thuan Chai (Lee Liam King with him)
For the respondent - Daljit Singh Sandhu (Geoffrey Sim & Vincent Joseph with him)

Reported by Michele Saw

JUDGMENT

Fuad PCA:

This is an appeal by Wong Sie Sing Contractor Sdn. Bhd. ('the employer') from the decision of Dato Sir Denys Roberts CJ dated 15 March 1997 as to the quantum of damages he awarded Gregory Anak Anyau ('Gregory') for the personal injuries he sustained as the result of an accident at work. The employer does not appeal against the judge's finding of negligence which was an issue at the trial. There is a cross-appeal by Gregory against the judge's conclusion that he had been guilty of contributory negligence and against the method the judge adopted in arriving at the damages he awarded.

The accident which gave rise to the action occurred on 8 November 1994 at about 7am. Gregory and two other men were working for the employer as carpenters on the roof of a school under construction at Beribi. It had rained during the previous night and the roof was wet and slippery. Gregory with

his two work-mates, first mounted an inside staircase which took them to the second floor. At that level they emerged from the building and walked across a plank to some scaffolding erected outside. They then used a ladder attached to the scaffolding to cross to the roof.

The three men had been working on the roof for a few days, preparing the wooden frames underneath, and hammering in the clip-locks into which the strips of metal roofing material were to fit. The roof was nearly complete save for the last few feet.

Just before the accident, the workmen had fitted a sheet of roofing material into place. Gregory had been at the bottom, one of his colleagues in the middle and the other at the top. None of the men was wearing a safety belt or indeed any safety gear.

To fix the strip of roofing material into the clip lock, Gregory said that he had to use the weight of his whole body. He was still in a crouching position when he slipped from the roof to the ground, a distance of just over 30 feet, and sustained very serious injuries.

Gregory, who had been working for the employer for about three months, was 23½ years of age when he fell. He suffered a dislocation of the fourth and fifth thoracic vertebrae, with complete paraplegia below the nipple line. Thus he cannot control his lower limbs. There is muscle wasting in both legs and they are fixed in a bent position. He is bound to a wheelchair for life. He has lost for ever the control of his bladder, his bowel and his anal sphincter. He cannot sustain an erection. He has deep pressure sores. He needs help to perform the normal functions of living and will need expert nursing care for the rest of his life.

He was a patient in RIPAS hospital from 8-28 November 1994 when he was taken to Sibu in a plastic jacket. Since then he had spent over 4½ months in hospital, mainly so that his bed sores could be treated. He was due to return to hospital after the trial of the action for a further operation and other treatment.

I have not summarised all the medical evidence and the apalling problems Gregory has to face for the remainder of his life. There were fully described by the doctors who gave evidence. After a full review of the evidence the judge awarded him $200,000 for pain and suffering and loss of amenities.

The employer's first complaint in this appeal is that this award was excessive having regard to Gregory's injuries. Although he suffered from total paraplegia, with no control over any part of his body below the nipple line, he retained the ability to move and control the upper part of his body. Thus he was not a tetraplegic.

Mr Chan, for the employer, referred us to *Cheng Choy Choo v. Wong Teck and Anor.*, a case briefly summarised in (1992) *Mallal's Digest* 341 where the High Court of Singapore awarded a man, aged 31 at the time of the accident, who suffered from complete paralysis of both lower limbs, only S$120,000. He contended that an award of a similar amount would have been appropriate in this case since the injuries suffered by the Singapore plaintiff were no less serious than those suffered by Gregory.

In this context, the judge mentioned a recent case in which he had awarded $180,000 for pain and suffering and loss of amenities to a man who had been 58½ years of age when he was injured – *Yong Kuang Su v. Yong Siong Hai Transport Co.* (HCCS No. 128 of 1995): judgment dated 17 November 1996. He observed that he did not regard Gregory better in physical terms than Yong although Gregory, unlike Yong, had retained the use of his arms. He said that he would have awarded $200,000 to Yong but for his age.

The judge's view of the general effect of the injuries upon Gregory's future life is indicated by the following extract from his judgment:

> Gregory does not seem to have been rendered unconscious by his fall. He must have suffered considerable pain while he was being treated – he still suffers some degree of pain every day. Even more than physical pain, it must have caused him serious mental anguish to realize that he has lost, for ever, the majority of his physical facilities being left with the ability to move and control the upper part of his body. He now faces ... an unhappy and restricted future, unable to stand, even with help, unable to work, unable to control his bladder or bowels. Gregory is a paraplegic who will not improve. A grim prospect for a young man.

Mr Sandhu (who did not appear in the trial court) sought to uphold the judge's award under this head. He relied on the authorities which state and re-state the principles upon which an appellate court should act when considering whether or not to interfere with an award of general damages made by a judge. These principles are so well established that I will cite only a passage from the speech of Lord Scarman in *Pickett v. British Rail Engineering Ltd.* [1979] 1 All ER 774 at p. 794:

> It is not the function of an appellate court to substitute its opinion for that of the trial judge. Lord Wright stated the general principle in a well-known passage in his speech in *Davies v. Powell Duffryn Associated Collieries Ltd.* [1980] AC at p. 172:

> In effect the court, before it interferes with an award of damages, should be satisfied that the judge has acted on a wrong principle of law, or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency.
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> The trial judge correctly apprehended the facts, and adopted the correct approach in law. Though to some the award of 7,000 pounds may seem low, it is not so low as to support the interference that the judge's estimate was wholly erroneous. In a task as imprecise and immeasurable as the award of damages for non-pecuniary loss, a preference for 10,000 pounds over 7,000 pounds is a matter of opinion, but not by itself evidence of error. I would, therefore, allow the cross-appeal and restore the judge's award of 7,000 pounds general damages.

In *Yong Kuang Su's* case itself, the judge referred to three comparable Singapore cases and to one from Brunei. The record of this appeal shows that a number of other such cases were cited to him. It is right to bear in mind that Gregory lives in a remote area with no water or electricity. It takes four hours on foot to get to the nearest hospital. It takes four of his friends to carry him along a jungle path. He is much younger than Yong was.

It seems to me that the judge has not been shown to have acted upon an erroneous principle of law, nor to have misapprehend the facts; comparable cases have been considered. I would find it impossible to interfere with the award under this head.

The employer raises a number of complaints in his appeal against the judge's award of $243,868 for loss of future earnings and earning capacity.

The judge concluded on the evidence before him that Gregory would have continued to work as a carpenter until he reached the age of 55, and could expect to live until he was 65. Thus he would have had a working life of 31½ years from the date of the accident.

Mr Chan submits that the judge, in assessing loss of future earnings, had not taken into account the vicissitudes of life, and such matters as the possibility of unemployment, sickness and accident. The judge did not award, of course, Gregory all that he would have earned until his retirement. The adoption of an appropriate multiplier will take into account those contingencies and I am not persuaded that the judge did not have them in mind when selecting the multiplier.

It is further contended by the employer that the judge ignored the evidence that Iban workers like Gregory were likely to change employers and be out of work for substantial periods during their working lives.

The evidence shows that Gregory planned to continue working in Brunei and going home for holidays; he was better paid in Brunei. He said he hoped to work here for a year or so, take a holiday at home and return "again and again". One of his co-workers on the roof had worked in Brunei for the past 11 years (Bunting Anak Salleh, PW3) and the other Nyalu Anak Mingat (PW4) for about 10 years.

The employer's foreman, Jerome (DW3) spoke of his experience with Iban workers in Sarawak where they did not stay long in a job and took breaks between jobs. But he recognized that it varied from person to person.

The judgment shows that the judge was aware of the matters Mr Chan relies upon. He did not accept that there should be any reduction on account of them, and I am unable to hold that he was wrong.

The employer submits that the judge should not have taken into account a cost of living allowance of $150 per month when assessing the multiplicand for the plaintiff's loss of earnings since there had been no evidence that the workers actually received, or were entitled to receive such an allowance.

On this aspect of the case the judge said: "I will take as showing what Gregory should have been paid, the figures contained in Wong's own signed return to the Commissioner of Labour ... This return stated that Gregory was paid ... a cost of living allowance of $150 a month ... this [sum] is what Wong himself says was due to Gregory". The return referred to is the Notice an employer is required to give to the Commissioner under s. 13 of the Workmen's Compensation Act, cap. 74.

Neither the plaintiff, nor the three co-workers he called, mentioned a cost of living allowance in their evidence. When Jerome (DW2), the employer's foreman, gave evidence-in-chief he was shown the Notice and said" "... I do not know what the $150 a month is, put in as a cost of living allowance". He was not cross-examined on the point. In reply to questions put by the court, he said that he had not signed the Notice or filled in any part of the form. He said that he did not know if the cost of living allowance was correct. He knew nothing about the matter. Mr Wong himself had signed the form.

On Gregory's behalf it is submitted that there was evidence that he was entitled to a cost of living allowance, by virtue of the contents of the Workmen's Compensation Act Statutory Notice. This evidence had not been rebutted. The

signatory, Mr Wong, had not given evidence and neither Gregory nor his witnesses had been asked in cross-examination about the cost of living allowance.

There was no mention of a cost of living allowance in the contract signed by the parties when Gregory was engaged.

In my respectful judgment, it was not sufficiently proved on the evidence that Gregory was in fact entitled to a cost of living allowance despite the mention of it in the Notice to the Commissioner of Labour. The pre-trial special damages and the post-trial general damages will be affected if the cost of living allowance claimed by Gregory is to be ignored.

For the employer, Mr Chan contends that the judge should not have included, in the sum he awarded for "Pre-trial special damages", an amount of MR12,600 for a "helper" since there was no evidence that such an expense had been incurred by the plaintiff pre-trial. The judge was aware of this and made this observation in his judgment:

> I appreciate that Gregory did not engage a helper to assist his wife in looking after him before the trial. But this should not affect the amount which is awarded to him. He may not have had the money to do this at that time.

In seeking to uphold this part of the judge's award, Mr Sandhu points out that there was evidence that Gregory's wife Helen (PW7) needed help to look after Gregory during the pre-trial months. She said that she could only get Gregory into and out of bed with the help of his mother, who looked after him while she was away working. Sometimes her own mother or a friend looked after Gregory when she was not at home. She added "It would be a great help to me and the family if I had someone to help look after Gregory. This had already happened before".

Gregory's testimony supported this evidence. He told the court that he had paid RM15 a day to help his wife more than once when his mother was away, the usual long-house rates.

It is clear from authority that if a plaintiff needs looking after, and expenses are not incurred because the services are performed gratituously by a relative or friend, the costs can be recovered as compensation to the extent that they are reasonable, *Cunningham v. Harrison* [1973] 942. I think that the judge arrived at a fair value for the services provided by the family, and occasionally by a paid helper, which were made necessary by Gregory's injuries.

The Employer's Notice of Appeal stated that the judge was wrong in taking the cost of Ponstan [pain killers] antiseptic solution [in sachets] and cotton swabs when assessing the cost of medical items needed by Gregory because "such items could be obtained free of charge at Kanowit hospital".

This ground of appeal was not proceeded with. Instead Mr Chan was permitted to argue that the judge should not have compensated Gregory for the cost of 120 sachets of antiseptic solution per month during the pre-trial period. There was, he said, no evidence to justify the award in respect of so many sachets. As his submissions were developed, he did not maintain this argument but submitted that only 60 sachets a month should have been taken into account because it was that number which had been pleaded in the re-amended statement of claim.

In my judgment there was evidence to support the judge's pre-trial award for this item, and I would unhesitantly grant leave to amend, despite Mr Chan's objection.

The employer also says that the judge was wrong in allowing Gregory the cost of as many as 150 incontinence pads per month pre and post trial. I will say no more than that there was ample evidence to justify the judge's decision; he was certainly not over-generous.

By his cross-appeal, Gregory challenges the judge's finding against him of contributory negligence, a finding which reduced the total award he would otherwise have received by 20 per cent. The judge deals with the issue in the following passage of his judgment:

> The burden of showing contributory negligence by the plaintiff rests on the defendant, who can discharge this burden on a balance of probabilities, which may be inferred from the evidence given by the plaintiff, and other witnesses, and the facts and circumstances of the case.
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> I cannot accept Jerome's evidence of any instructions given by a senior carpenter called Ling to Gregory or his co-workers as to how the roofing sheets ought to be attached to the clip-lock, since Ling himself gave no evidence.
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> The knowledge of the plaintiff of the existence of a danger is not, of itself, evidence of contributory negligence.
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> It is not sufficient to establish contributory negligence, for an employee to continue to work, in the knowledge that a danger exists. The failure of an employer to discharge his duty to take reasonable precautions to ensure the safety of a worker does not absolve the employee from his duty to take reasonable care of himself. If an employee can be shown to have had a reckless disregard for his own safety, he can be found to have contributed to his accident by his own negligence.

> Contributory negligence depends on the forseeability of harm to himself. Gregory knew that it was dangerous to stand on the roof, without a safety belt. This was, in my view, a dangerous method to adopt even if the roof was dry. He knew that the roof was wet and slippery on 8 November 1994 and that it was dangerous to walk on the roof at such times.
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> I take into account the realties of the situation, which was that Gregory was afraid of losing his job if he asked for a safety belt and that he had been told that he should attach the roofing to the clip-lock by lying on the roof. He was supported in this by his colleagues working on the roof. Nevertheless, the fear of losing work should not be allowed to excuse an employee from carrying out a method of work which he knows to be dangerous. I accept that Gregory believed that he was obliged to carry out his work by lying full length on the roof and that he had stood on the roof before, in order to do this. There were I find, no orders as to how the work should be carried out on a wet day. However, their absence does not absolve Gregory from taking care of himself, which would have involved either not standing on the wet roof without a safety belt, or asking again for the provision of such a belt.
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> It is never easy to apportion blame. I realise that this can be no more than a subjective assessment and that previous cases are of little help in the apportioning of responsibility. The major fault lies with the employer, for failing in his duty to provide a safe system of work. The employee was at fault, to a lesser extent, by carrying out a system of work which he knew to be dangerous, without proper regard for his own safety. I will apportion 80% of the responsibility for the accident to the employer and 20% to Gregory. It will therefore be necessary to reduce the award of damages to Gregory accordingly.

There is no challenge to the primary facts found by the judge. The complaint is that these facts did not support the judge's conclusion that Gregory had been to any degree blameworthy for the accident.

The employer's foreman, Jerome (DW2) described the method he would have used had he been working on the roof, like this:

> I would put a strip over a clip lock by pressing with my palms. I would do this without standing on the metal strip. I would stand on the timber frame. It is not difficult to put the metal frame on the clip locks. This requires some pressure but not the body weight.

The judge did not make a finding as to whether the work could have been done that way but he did not find Gregory at fault for using the method adopted by him and his work-mates, the method they had been told to use. Nor did the judge find that Gregory had carried out that method carelessly. Rather, as I understand the judgment, Gregory's fault lay in working on the wet roof without a safety belt when he knew it was dangerous to do so, and in not asking again for one.

Thus the evidence about safety belts is important. One of Gregory's fellow workers, Bunting Anak Salleh (PW3) who had been working on the site in question for about three months before the accident, gave evidence that he never saw anyone with a safety belt on the worksite. He did not hear the foreman telling anyone to wear one. Before the accident, he had asked Mr Wong himself for a safety belt, a safety helmet, safety boots and gloves. Mr Wong's response had been to say that if he wore the safety items he would work very slowly, adding "If you don't want to work you can leave".

Another fellow worker, Nyalu Anak Mingat (PW4) told the court that when he asked Mr Wong for a safety belt and other safety equipment, he was told that none could be supplied "as this was expensive". The workers had asked for such equipment after the accident but were denied it.

David Mat Anak Anji (PW5) had been working on the site for about six months before the accident. He said he had received no safety equipment when he had asked for it.

He was told "this would slow down the process of installing the roof". He, too, had repeated his request after the accident but had been met with the same response.

Gregory himself (PW6) testified that he was given nothing in the nature of safety equipment; he had not dared to ask for it because of what his colleagues had told him.

I mention here that the employer's cynical approach to the provision of safety equipment for his workers is graphically demonstrated by the evidence of Bunting and Gregory, supported by the employer's own foreman, that safety helmets were provided when safety officers came to inspect the site, and taken back again when they left. The judge, not surprisingly, observed that this indicated that the employer had little regard for the safety of his workers.

Bunting and Nyalu testified that when they worked for other employers in Brunei, they were given safety belts to use.

A number of cases have been cited to us illustrating the recognition by the courts of the position of an employee in the workplace when considering whether or not he is guilty of contributory negligence. Of course every case will depend on its own facts.

In *General Cleaning Contractors Ltd. v. Christmas* [1953] AC 180, HL where a window-cleaner fell and was injured, Earl Jowitt at p. 39 cited with approval a passage from the judgment of Denning LJ, in the decision appealed against. Part of that passage is as follows:

> If employers employ men on this dangerous work for their own profit, they must take proper steps to protect them, even if they are expensive. If they cannot afford to provide adequate safeguards, then they should not ask them to do it at all. It is not worth the risk. That seems to be the view of the London County Council, for they have made regulations forbidding a man to stand or kneel on a still adjoining a highway unless he is hooked on by a safety belt. At the hearing of the appeal it was suggested that the accident might have been avoided if the man had put in a block to prevent the bottom sash coming right down as it did. This was, in effect, a suggestion of contributory negligence. This was negatived by the judge, and I agree with him. You cannot blame the man for not taking every precaution which prudence would suggest. It is only too easy to be wise after the event. He was doing the work in the way which the employers expected him to do it and, if they had taken proper safeguards, the accident would not have happened.

In *Harris v. Brights Asphalt Contractors Ltd*. [1953] 1 QB 61 the workman fell off a flat roof onto an adjoining sloping roof made of asbestos. The asbestos broke and he fell to the ground. No safety equipment was provided. The method of working the plaintiff had adopted was the normal one for such work but it could have been performed by standing on boards placed on the sloping roof. The plaintiff knew that the roof was fragile but he did not ask for planks to be placed on it or for anything to catch him if he should fall.

Slade J at p. 629 had this to say:

> Of course, I appreciate that it might be said that, as I have found against the defendants on negligence and breach of duty, I ought to accept and apply the same standards to the plaintiff in considering whether he was also guilty of negligence. I do not think that a court ought to be too astute to find a workman guilty of negligence, either as the sole or contributory cause of the accident, when he does not demur to a risk which the employer has imposed upon him, *ex hypothesi*, by a breach of common law duty or a breach of statutory duty. I am satisfied that the risk which the plaintiff ran was one which employee after employee knowingly, not voluntarily but knowingly, runs; in other words, a risk which is imposed on him by the system of working which is adopted by his employers and to which he does not demur. I am fully alive to the fact that an employee is also under a duty to his employer to take reasonable precautions for his own safety; but I do say that when the failure to do so consists of not demurring to a risk which his employers have imposed on him, the court ought not to be astute in finding contributory negligence. Using the best judgment which I can on the facts and the evidence in this case, I find as a fact that the plaintiff was not guilty of contributory negligence.

A recent decision (21 July 1997) of the Privy Council, on an appeal from Gibraltar, is helpful: *Agol Maritime Ltd. v. Antonio Galleguillos Acori* PC Appeal No. 46 of 1996. In that case the plaintiff, a seaman, had been stacking timber with other members of the crew. The timber had to be covered by a tarpaulin which was to be held in place by chains. To prevent the chains chafing the tarpaulin, planks of wood had to be laid on top of the tarpaulin. The plaintiff continued to work after the other members of the crew had gone below. He was carrying a piece of timber about 16 feet long and when he was on top of the stacked timber covered by the tarpaulin he slipped on the icy canvass and injured his back. He knew the tarpaulin was icy and was aware of the danger presented by the ice although he said he was walking with great care at the time.

In giving the judgment of the Board, Lord Browne-Wilkinson said this:

> In the Court of Appeal all three members of the court apparently accepted that the appropriate test of fault was the same as that applicable in the case of contributory negligence. However, they differed as to the result of applying that test. Fieldsend P. held that the plaintiff was at fault in that he had encumbered himself with an awkward load in slippery conditions thereby making it more likely that he would slip. The other two members of the court found the plaintiff not to be at fault. They held that he was doing the job he had been instructed to do in dangerous conditions of which he was aware. He exercised as much care as possible in the circumstances. The only way in which he could have avoided the risk of slipping was to stop doing the job he was instructed to do. For a seaman to continue to do work which he has been instructed to do in circumstances which he knows to be dangerous does not amount to carelessness for his own well being.
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> Their Lordships agree with the view of the majority of the Court of Appeal. A seaman's working life involves doing many dangerous tasks: the doing of such tasks if ordered to do them is not per se negligent. Only if the judge had found (which he did not) that the plaintiff should have stopped doing the job that he was instructed to do and sought assistance could he have been found to be at fault. The plaintiff was not careless in the way he carried out an inherently dangerous task. In the circumstances their Lordships cannot find any ground to differ from the trial judge's finding of no fault, even though the judge reached his conclusion on a different basis.

It is clear from the evidence accepted by the judge that Gregory was working on the roof in the manner expected by the employer when he slipped and fell. He and his two co-workers also found it necessary to use the weight of their whole bodies to press down the section of roofing they were to fix to the clip locks underneath. There is cogent evidence to suggest what the response would have been if Gregory had asked for a safety belt before he climbed on

to the roof. If his request had been refused, as it surely would have been, and had he declined to climb on to the roof because it was wet, he would have risked losing his job when one recalls what Mr Wong had said to Bunting (PW3).

The evidence did not suggest that Gregory was trying to save himself trouble by doing the work in the way that he did. He was simply doing his job in the manner required of him and the accident would not have happened if the employer had been concerned with the safety of his workers and provided them with safety belts.

In these circumstances, in my judgment it could not be said that because Gregory realised the danger, it was so unreasonable for him to have continued working on the roof that day as to constitute contributory negligence. Although the judge dealt with this issue with anxious care, with great respect, I feel it impossible to uphold his conclusions on the evidence which he accepted. I agree with Mr Sandhu that the employer did not succeed in establishing, on the balance of probabilities, that Gregory had been guilty of any degree of contributory negligence.

I now turn to address the multiplier used by the judge in assessing Gregory's loss of earnings. Both parties challenge the figure adopted by the judge and way he applied the multiplier. On the evidence before him, the judge concluded that Gregory, who was almost 23½ years of age at the time of the accident, could have expected to work as a carpenter until he reached the age of 55, the normal age of retirement, another 31½ years after the accident. He then said that he would follow the table set out in *Chan Chi Fook v. Spennex Stainless Steel Industries* [1995] BJ 208, at pp. 221-222, and apply a multiplier of 16 or 192 months. The judgment continues:

> I will take 28 months as the pre-trial multiplier. This is 28 x $1190 = $33,320.
> For the post trial mutliplier of 164, I multiply 1487 x 164 = $243,868.

In *Chan Chi Fook's* case which was a decision of his own, the Chief Justice adopted a table, which he said was based on the Pearson Report and was largely a reflection of the present practice of the Singapore and English Courts. For the purposes of this appeal, the material part of the table is:

A	B
Years of earnings lost	Multiplier
...	...
25, 26, 27, 28, 29	15
30, 31, 32, 33, 34	16
35, 36, 37, 38, 39	17
...	...

The conventional method of assessing the amount to award a surviving plaintiff for the loss of earnings as the result of an accident is to calculate the actual loss from the date of the accident to the date of the trial, and to award that sum as special damages. As regards future loss of earnings, an estimate is made of the likely average annual loss and for what period the loss would continue. This calculation is made from the date of the trial. A multiplier will then be applied to arrive at the appropriate capital sum to be awarded.

The position is different when a court is assessing the future loss of dependency in a fatal accident case, where the multiplier is to be selected as at the date of death, and a deduction is made for the period for which special damages were awarded: see *Graham v. Dodds* [1983] 2 All ER 953, HL. Both counsel have submitted that the judge erred in assessing the multiplier as from the date of the accident.

In respect of the loss of future earnings, by adopting the method he did, the judge in reality applied a multiplier of 13.66 (164 months) arriving at a sum of B$243,868. Mr Sandhu conceded that properly to apply the judge's figure of 16 as a multiplier for the post-trial loss of earnings would result in too high an award. He suggested that taking into account the number of years of earnings lost post trial, as found by the judge, and other relevant factors, the appropriate multiplier would be 15. Mr Chan submitted that 13 would be the right figure.

I do not know how relevant is the table used by the judge in the assessment of pre-trial loss in the case of a surviving plaintiff. We have not been shown the Pearson Report, but in cases where the plaintiff is still alive, the word "multiplier" is generally understood to apply when loss of earnings or earning capacity post-trial is under consideration. It is not properly used for the calculation of earnings lost from the date of the accident to the trial. The sum to be awarded for that period is capable of proof and is awarded as special damages. A "multiplier" is not needed for this purpose although, of course, some multiplication may be involved in ascertaining the sum.

From the examples cited to us, and from experience of other cases, I have reached the conclusion that 15 would be the appropriate multiplier for the post-trial loss in this case.

In respect of 10 medical items (such as urinary bags and incontinence pads etc.) the judge, in explaining what he would award, said: "In each case, the multiplier is 28 times the monthly cost for pre-trial expenditure and 164 times the post-trial expenditure (total is 16 years)".

Mr Sandhu has relied on the same submission he had made earlier regarding the multiplier in fact adopted by the judge for assessing the post-trial loss of earnings. He contended that having regard to Gregory's age at the date of the trial, and his life expectancy of 65 years (giving him 39 more years of life) the appropriate multiplier, in accordance with the table in *Chan Choi Fook's* case, was 17 and in dividing the multiplier into two parts, the judge had in fact again applied a multiplier of 13.6 years (164 months) to these items.

Of course, since these medical expenses will continue after retirement, the multiplier will legitimately be higher than that adopted for the loss of future earnings, where the governing factor is the length of the plaintiff's future working life. Mr Chan's suggested figure for this aspect of the case is 15. He acknowledged that it would not be fair to the plaintiff in this case if an overall multiplier were chosen.

Having regard to the plaintiff's life expectancy after retirement (10 years) in my view the multiplier effectively applied by the judge is too low and a multiplier of 16 would be right to ascertain the sum to award for the continuing medical expenses post-trial. I have discounted this figure since the difference in the working life of the plaintiff and his life expectancy lies so long in the future.

Consistent with my judgment, there would be no deduction for contributory negligence and, if my arithmetic is correct, the following adjustments would have be made to the awards made at the trial:

(a) The pre-trial loss of earnings to be given as special damages would be reduced from B$33,320 to **B$29.120** since a cost of living allowance of B$150 a month was not proved. (1,190-150 x 28).

(b) The multiplicand for the post-trial loss of earnings would be reduced from B$1,487 to B$1,337 for the same reason. Applying a multiplier of 15, the figure of **B$240,660** is reached (1337 x 12 x 15). This is less than the judge awarded although a higher multiplier is now applied, because no cost of living allowance has been taken into account.

(c) The cost of a helper post-trial would be increased from RM84,600 to **RM86,400** (450 x 12 x 16).

(d) When a multiplier of 16 is adopted and applied to the cost of the 10 medical items in question, for the post-trial period, in the place of the figure in Column 1 would be substituted the figure in Column 2, all in RM:

Item	1	2
Urinary bags	2,296	2,688
Microscopic tapes	2,296	2,688
Incontinencepads	55,350	64,800
Antiseptic solutions	29,520	34,560
K.Y. Jelly	574	672
Ponstan	2,952	3,456
Vitamins	2,706	3,168
Catheters	3,280	3,840
Cotton swabs	4,920	5,760
Surgical tapes	4,920	5,760
	Total:	RM127,392

I would make an order accordingly.

Huggins JCA:

I agree with the order proposed, but as we are disagreeing with the trial judge on a number of points will add some words of my own.

Cost Of Living Allowance

In relation to loss of earnings a cost of living allowance of B$150 p.m. was taken into account. The evidence did not support a finding that the respondent was entitled to such an allowance. It is not mentioned in the written contract of service and none was paid. The only reference to a cost of living allowance was in a notice given by the employer under the Workmen's Compensation (Amendment) Enactment 1978. How it came about that the notice stated the respondent received a cost of living allowance was never explained.

What the respondent contends is that by a re-amendment made to the statement of claim on the penultimate day of the trial the cost of living allowance was asked for, although no legal basis for such a claim was pleaded and it was described merely as "allowance". As I understand it, the argument is that the appellant did not specifically deny this new plea, although it was countered by the general traverse in the defence, and that accordingly it was never really disputed. I cannot agree. There was no admission, and it was incumbent on the respondent both to plead facts which would support the claim and to prove those facts. It is now conceded that no question of estoppel can arise here. I do not see how this sum can properly be included as part of the earnings. There should be a reduction in the total figure used in calculating the respondent's loss, both before and after trial.

Medical Items

There was much argument about the precise extent of the respondent's need for some of these items. In the event the appellant pursued his objections to only two items, the antiseptic solution and the incontinence pads.

In respect of the first of these it was eventually conceded that there was merely a pleading point The Chief Justice made an award on the basis of 120 sachets a month pre-trial and 60 post-trial, the reduction being based on the fact that some of the solution was required for the treatment of pressure sores which were healing. It was pointed out that the statement of claim did not claim for 120 sachets. The Respondent asked us for leave to amend. It is clear that the larger quantity was in fact used and it is right that we should give leave to amend and not disturb the judge's finding.

There is a dispute as to the number of incontinence pads the respondent will need. There was evidence that a catheter could be used and that, if it were, the number of pads required would be reduced. The Chief Justice made provision both for catheters and for five pads a day. Speaking for myself I think that, when one bears in mind that there may be leakage even when a catheter is used, a higher figure might well have been taken. To reduce the award, as the appellant asks, would be unreasonable, particularly having regard to the fact that the Chief Justice based his calculations throughout on a 30 day month.

It follows that the total of the medical items should be allowed at M$1,232 a month pre-trial and M$663.50 a month post-trial.

Multipler

The Chief Justice in assessing the post-trial loss of earnings said he would use a multiplier selected with the aid of a Table which he had himself drawn up in *Chan Choi Fook v. Spennex Stainless Steel Industries Sdn. Bhd.* 1994 J.C.B.D. 273, 221 and which he said he intended to use in all future personal injury cases which he tried. My first re-action on seeing this Table was one of anxiety, and the argument in this court has confirmed that that anxiety was well founded.

The Table is in two columns. The first is headed "Years of Earnings Lost" and the second "Multiplier". It is now well established that the courts can assess a loss of future earnings as the product of (a) the total estimated annual earnings from the date of trial to the anticipated date of retirement and (b) a figure based on the number of years the resulting fund will last before it is exhausted, if sums equal to those annual earnings are withdrawn each year. That figure is intended to make proper allowance for the fact that the plaintiff will receive an immediate lump sum in place of periodic payments during the rest of his anticipated working life but, also, the fact that in this world there are many contingencies which might shorten his working life or otherwise affect his capacity to earn (commonly known as "the vicissitudes of life". In the context in which the Table was introduced it is reasonable to suppose that the heading "Multiplier" indicated figures arrived at with all those considerations in mind. The words in the heading to the first column, "Years of Earnings Lost", in their ordinary meaning would include (in the case of a person permanently disabled from working) the period from the date of the accident to the date of assumed retirement. However, in the context the words might also be taken to include only the limited period from the date of trial to the date of assumed retirement, since no "multiplier" in the sense in which that word is used in assessing damages for loss of earning capacity is needed to assess the pretrial loss, that being special damage which is the loss actually incurred and which is capable of precise calculation. As my Lord, the President, pertinently enquired, which of those meanings was intended by the heading in this Table? A lawyer's instinct would lead him to reply that only the post-trial period was intended, but there is something which casts doubt upon that interpretation and which suggests that the other meaning was in fact intended. It is this; when he came to apply his Table, both in *Chan's* case and in the present case, the Chief Justice did so to the whole period from the date of the accident to the assumed date of retirement. Thus, here he said that the respondent was 23½ at the date of the accident, so he took 31½ years from that date to the assumed retirement age of 55. Selecting 31 in the first column he then took 16 from the second as the appropriate multiplier. Next

he deducted the period from the accident to trial (28 months) from the period from accident to retirement (192 months) making 164 months, and, in effect, applied a multiplier of only 13.66 in assessing the post-trial loss. This could only show that he thought the difference between the multiplier of 16 taken from the Table and the effective multiplier of 13.66 was in some way referable to the pre-trial period. It is, of course, true that the pre-trial loss had to be assessed by multiplying the actual monthly earnings by the number of months between the accident and the trial, but that had nothing to do with the "multiplier" required to assess the post-trial loss.

There are other reasons, not relevant to this case, which lead me to doubt the reliability of this Table. I appreciate the convenience of having guidance in the form of an actuarial table, but I think the table we are considering here ought not to be used. That being so, we have to ask ourselves whether the multiplier of 16 which the judge purported to adopt was right in all the circumstances of the case.

Neither party sought to support a multiplier of 16 in relation to the loss of earnings: the appellant proposed one of between 12 and 14 and the respondent one of 15. Mr Sandhu for the respondent referred us to *Lai Wee Lian v. Singapore Bus Service* [1978] 4 PCC 28 and *Gelau Anak Paeng v. Lim Phek San* [1965-1986] 2 BLR 152, where plaintiffs of approximately the same age as the respondent were given awards based on a multiplier of 15, and he submits that that would be fair in the present case. I am disposed to agree.

In the light of what I have said about the cost of living allowance I think we must deduct $150 from the Chief Justice's assessment of the monthly earnings at B$1,190 p.m. and the post-trial earnings of $1,487 p.m.. That leaves a pre-trial loss of $1,040 for 28 months (ie, B$29,120) and a post-trial loss of $1,337 p.m. for 15 years and 189 months (ie, B$240,660).

The question then arises whether the same multiplier should be applied in relation to the future medical needs of the respondent. Counsel on both sides agree that it should not; and I think that is clearly right: The Chief Justice found that the respondent's expectation of life was 36 years – to the age of 65 years, which is 10 years after the assumed date of retirement. Those 10 years lie a long time in the future and we should not be over-generous, but there remains a real possibility that the respondent's medical needs will continue after any fund based on the retiring age would have been exhausted. Indeed, he might live beyond the 65 years anticipated by the judge, but we cannot make provision for that eventuality. The editors of 1 Kemp & Kemp (1986 Ed.) on "The Quantum of Damages in Personal Injury and Fatal Accident Cases" 604 (6-007) give persuasive reasons for the adoption of a

higher multiplier in respect of future expenses, and I am satisfied those reasons are sound.

Counsel for the respondent invites us to fix 17 as the multiplier for the medical items, and counsel for the appellant 15. Since we have said that 15 is appropriate in relation to the loss of future earnings, I agree with my Lord that 16 would be fair in relation to the future expenses.

Contributory Negligence

By his cross-appeal the respondent asks us to set aside the finding of contributory negligence. The Chief Justice said:

> [The plaintiff] knew that it was dangerous to stand on the roof, without a safety belt. This was, in my view, a dangerous method to adopt even if the roof was dry. He knew that the roof was wet and slippery on 8.11.94 and that it was dangerous to walk on the roof at such times.

This was the basis of his finding of contributory negligence, but it is to be noted that earlier in his judgment he had said:

> [The plaintiff) was still in a crouching position when he slipped from the roof to the ground.

I think we must assume that by "the roof" he meant the roofing sheets which were being fitted and that the expression did not include the timbers which supported them. The facts appear to be that the respondent, a sheet having been positioned over the clips, climbed to a place on that sheet where he could apply the necessary pressure to make the clips open and lock the sheet with his knees and body bent in a crouching position. In that position he would have to walk duck-like from one place to another. At what place he got on to the sheet – whether from the the bottom or the side, where he would initially have been standing erect on the lower timbers – does not appear. It does not matter whether or not he actually lay down on the sheet, as the Chief Justice appears to have thought, though his evidence was that he was crouching "at all times" and one of the other workers said "You have to stand on a roofing sheet when you put it in place". Having locked one sheet in place the respondent moved a couple of steps to receive the next sheet from those below, and it was then that he slipped. The Chief Justice clearly accepted that the procedure adopted by the respondent on this occasion was one which the workers had been using for some time to the knowledge of the foreman. He correctly said that the respondent's knowledge of the existence of the danger was not by itself evidence of contributory negligence, but he nevertheless thought that the respondent was negligent in using this method without a safety

belt or in not asking again for the provision of such a belt. He said that "the fear of losing work should not excuse an employee from carrying out a method of work which he knows to be dangerous".

In my view that was to impose too heavy a burden upon the respondent; and I am reinforced in that view by authorities which were not cited in the court below. In *Machray v. Stewarts & Llovds Ltd.* [1964] 3 All ER 716, 721 McNair, J said:

> .. when I find a workman, an employed man, adopting a course of conduct not for the sake of saving himself trouble but in order to get on with his employer's business, and when I find he has been prevented from doing the work in the way in which he would have preferred to do by the employer's breach in not providing him with the proper tackle, I am very slow to put any blame on him ...

To the like effect was *Harris v. Bright's Asphalt Contractors Ltd.* [1953] 1 QB 617, 629, where Slade, J said:

> I do not think that a court ought to be too astute to find a workman guilty of negligence, either as the sole or contributory cause of the accident, when he does not demur to a risk which the employer has imposed upon him, *ex hypothesi*, by a breach of common law duty or a breach of statutory duty. I am satisfied that the risk which the plaintiff ran was one which employee after employee knowingly, not voluntarily but knowingly, runs; in other words, a risk which is imposed on him by the system of working which is adopted by his employers and to which he does not demur. I am fully alive to the fact that an employee is under a duty to his employer to take reasonable precautions for his own safety; but I do say that when the failure to do so consists of not demurring to a risk which his employers have imposed upon him, the court ought not to be astute in finding contributory negligence.

The risk (in this case a risk threatened by the appellant) of dismissal if the worker persists in asking for proper safety equipment is a material consideration, save possibly when there is a great shortage of labour and alternative jobs with good employers are readily available.

I agree that the finding of contributory negligence should be reversed.

Conclusion

No point has been taken in relation to the medical equipment, and even though we are taking a multiplier of 16 instead of 18 I would not interfere with the awards for both replacement and maintenance, which I think were generous.

The result is that the total "unadjusted" damages of B$640,892 as awarded in the court below should be decreased to B$640,578 (B$261,593 pre-trial and B$378,985 post-trial) but the "Final Total (after adjustments)" should be increased from B$468,852 to B$597,416. Interest as awarded must be paid on the amended awards.

McMullin JCA:

I agree and there is nothing I wish to add.

Fuad PCA:

The appeal and cross-appeal are therefore allowed to the extent indicated in the judgments.

In handing down the judgments, we make an order nisi that the respondent shall have the costs of the appeal and of the cross-appeal; the order to become absolute at the expiry of 14 days from today unless an application is made to vary the order.